Fordham Law Review

Volume 64 | Issue 3 Article 17

1995

The Constitutionality of Punishing Deadbeat Parents: The Child Support Recovery Act of 1992 After United States v. Lopez

Ronald S. Kornreich

THE CONSTITUTIONALITY OF PUNISHING DEADBEAT PARENTS: THE CHILD SUPPORT RECOVERY ACT OF 1992 AFTER *UNITED STATES V. LOPEZ*

Ronald S. Kornreich

INTRODUCTION

The Child Support Recovery Act of 1992 ("CSRA" or the "Act")[1] makes the failure to pay a past-due child support obligation for a child living in another state a federal crime.[2] To be subject to prosecution under the Act, a defendant's failure to pay must be willful and his[3] past-due child support obligation must be either greater than $5000 or have remained unpaid for more than one year.[4]

The CSRA was enacted in response to a nationwide increase in the number of deadbeat parents and the particular difficulty custodial parents face in enforcing child support obligations when the noncustodial parent relocates to a different state.[5] Presumably, Congress passed the CSRA pursuant to its Commerce Clause power to "regulate Commerce . . . among the several States."[6] Over time the Supreme Court has expanded the meaning of this grant of power to Congress and upheld Commerce Clause legislation dealing with national social and economic problems.[7] The Court has permitted Congress to enact legislation even where the principle purpose of such legislation was not a commercial or economic one, but a social or moral one.[8]

In April 1995, for the first time in nearly sixty years, the Supreme Court overturned a federal law as exceeding Congress's Commerce Clause authority.[9] In *United States v. Lopez*,[10] the Court held unconstitutional the Gun-Free School Zones Act of 1990,[11] which made the

1. Pub. L. No. 102-521, 106 Stat. 3403 (1992) (codified at 18 U.S.C. § 228 (1994)).

2. 18 U.S.C. § 228(a).

3. For reasons of simplicity, this Note will use masculine pronouns to refer to the noncustodial parent and feminine pronouns to refer to the custodial parent.

4. 18 U.S.C. § 228(a), (d)(1)(B).

5. *See* H.R. Rep. No. 771, 102d Cong., 2d Sess. 4-5 (1992) [hereinafter Legislative History].

6. U.S. Const. art. I, § 8, cl. 3. The government has defended the Act numerous times on the grounds that it is a valid exercise of Congress's commerce power. *See infra* part IV.

7. *See* 1 Ronald D. Rotunda & John E. Nowak, Constitutional Law § 4.4, at 371 (2d ed. 1992).

8. *See id.* § 4.8, at 400; *infra* notes 130-48 and accompanying text.

9. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down Bituminous Coal Conservation Act of 1935, which set maximum-hour and minimum-wage work requirements in the coal industry); Linda Greenhouse, *High Court Kills Law Banning Guns In A School Zone*, N.Y. Times, Apr. 27, 1995, at A1.

10. 115 S. Ct. 1624 (1995).

11. Pub. L. No. 101-647, 104 Stat. 4844 (1990) (codified as amended at 18 U.S.C. § 922(q) (1994)).

possession of a firearm near a school zone a federal crime.[12] The Court found that the statute was not a valid exercise of Congress's power pursuant to the Commerce Clause because the possession of a gun near a school was not a commercial activity and did not substantially affect interstate commerce.[13]

Although *Lopez* did not purport to overrule any previous Commerce Clause rulings, the decision calls into question Congress's power to enact the CSRA pursuant to its commerce power. It may be argued that because the Commerce Clause did not authorize Congress to prohibit the possession of a gun near a school, it, therefore, does not empower Congress to make the failure to pay child support a crime.

Seven courts have ruled on the constitutionality of the CSRA since the Supreme Court decided *Lopez*.[14] District courts in Arizona, Texas, and Pennsylvania have found the CSRA unconstitutional.[15] Conversely, district courts in Kansas, Virginia, Indiana, and Connecticut have held that the Commerce Clause permits Congress to enact a federal criminal nonsupport statute.[16]

This Note will examine the constitutionality of the CSRA after *Lopez*. Part I will address the child support enforcement problem, emphasizing the difficulties faced by custodial parents in interstate cases. Part II will introduce the CSRA, determine the situations in which deadbeat parents are prosecuted under the Act, and examine why the Act has been used so sparingly. Part III will include a discussion of *Lopez* and the relevant Commerce Clause cases that preceded that decision. Part IV will examine the district court cases that have ruled on the constitutionality of the CSRA. Finally, part V will distinguish the CSRA from the Gun-Free School Zones Act and conclude that Supreme Court jurisprudence prior to *Lopez* is more applicable to an assessment of the constitutionality of the Act. The commercial nature of the child support payment obligation and the economic implications of nonsupport, along with the requirements of the Act and the legislative history accompanying it, lend support to the conclusion that the CSRA is a valid exercise of Congress's power to regulate interstate commerce.

12. 18 U.S.C. § 922(q)(2)(A); *see infra* part III.B

13. *Lopez*, 115 S. Ct. at 1630-31.

14. *See infra* part IV. In addition, the Ninth Circuit denied standing to challenge the CSRA to a noncustodial parent who resided in the same state as his children; the parent had not been prosecuted under the Act and did not face a threat of prosecution. Knight v. United States, No. 93-35604, 1993 WL 501578 (9th Cir. Nov. 17, 1993).

15. *See infra* part IV.A.

16. *See infra* part IV.B.

I. THE CHILD SUPPORT ENFORCEMENT PROBLEM

More and more children are being raised in single-parent households.[17] Among the factors contributing to this trend are increases in the number of separations and divorces and the growing rate of out-of-wedlock births.[18] As of the spring of 1992, 11.5 million women and men were single custodial parents of children under the age of twenty-one.[19] Studies have shown that as many as one in four children lives with a single mother.[20]

The single parent who must provide for her children often depends on child support payments to supplement whatever she can contribute on her own or through public assistance programs.[21] Child support, however, frequently is not awarded,[22] and enforcing an award can be an onerous, if not impossible, task. According to the Bureau of the Census, nearly one-half of the parents due child support in 1991 did not receive full payment—of these parents, about one-half received partial payment while the other half received no payment at all.[23] That same year, $5.8 billion of the $17.7 billion due in child support went unpaid.[24]

---

17. *See* Paula Roberts, Center for Law and Social Policy, Ending Poverty As We Know It: The Case for Child Support Enforcement and Assurance 4-5 (1994); U.S. Dep't of Health and Human Services, Child Support Enforcement: Eighteenth Annual Report to Congress 3 (1993) [hereinafter Congressional Report].

18. Congressional Report, *supra* note 17, at 3. Twenty-one percent of all marriages ended in divorce in 1990, more than double the 9% rate of 1960. Sara McLanahan & Gary Sandefur, Growing Up With A Single Parent: What Hurts, What Helps 138 (1994). Furthermore, in 1991, the number of births to unmarried mothers was at its highest ever, 1.2 million, which is an increase of 82% from 1980. Congressional Report, *supra* note 17, at 4. Births to unmarried women as a proportion of all births increased from 18% in 1980 to almost 30% in 1991. *Id.*

19. Lydia Scoon-Rogers & Gordon H. Lester, U.S. Dep't of Commerce, Econ. and Statistics Admin., Child Support for Custodial Mothers and Fathers: 1991, at 1 (Bureau of the Census, Current Population Reports, Series P60-187, 1995) [hereinafter Child Support 1991]. Of the 11.5 million custodial parents, 9.9 million were women and 1.6 million were men. *Id.* Traditionally, the father had primary responsibility for the support of his children, with the mother liable in the event that the father did not provide support. 1 Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 7.2, at 435 (2d ed. 1987). Today both mother and father are obligated to support their children pursuant to state statutes, state judicial decisions, or the Equal Protection Clause of the U.S. Constitution. *Id.*

20. Roberts, *supra* note 17, at 5.

21. The need for child support payments is illustrated by the discrepancy in poverty rates between single parents and married couples with children. According to Census data, single mothers and single fathers have poverty rates of 35% and 13%, respectively, both exceeding the 8% rate for married couples with children. Child Support 1991, *supra* note 19, at 1; *see infra* notes 249-54 and accompanying text.

22. In 1991, only 6.2 million of the 11.5 million custodial parents were awarded child support. Child Support 1991, *supra* note 19, at 1.

23. *Id.* at 1. In 1991, 5.3 million custodial parents were supposed to receive child support payments. Of these parents, 1.27 million (23.8%) received only partial payment, and 1.32 million (24.8%) received no payment at all. *Id.* at 7.

24. *Id.* at 2.

Enforcement of the child support obligation is exacerbated when the custodial parent and the noncustodial parent live in different states.[25] This is an increasingly common phenomenon. Child support enforcement, which traditionally has been a matter of state law, has become more nationalized because of the increasing mobility of American citizens.[26] Noncustodial parents frequently relocate and find new employment; in fact, among cases handled by government agencies, the average length of employment for noncustodial parents is three months.[27]

Estimates indicate that interstate child support cases represent approximately one-fifth[28] (and possibly more than one-third)[29] of all child support cases in the United States. Yet, according to a report, less than one of every ten dollars of child support actually collected nationwide comes from interstate cases.[30] Fifty-seven percent of mothers in interstate cases reported receiving child support payments occasionally, seldom, or never.[31] Only forty-three percent received payments regularly, compared with sixty percent of mothers in intrastate cases.[32]

Whatever the exact figures, clearly the amount of child support that goes uncollected has social as well as economic implications. Custodial parents and their children must find other means of support to substitute for the approximately $5 billion that does not reach its intended destination.[33]

---

25. *See* Roberts, *supra* note 17, at 25-28. For example, on average interstate cases take seven months longer to process than intrastate cases. U.S. Commission on Interstate Child Support, "Supporting Our Children: A Blueprint for Reform" 3 (1992) [hereinafter Supporting Our Children].

26. Janelle T. Calhoun, Comment, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 Mercer L. Rev. 921, 924 (1995). Interstate child support collections totaled a record $725 million in 1993, an increase of 15.8% over the previous year and 79% since 1989. Congressional Report, *supra* note 17, at 71.

27. Calhoun, *supra* note 26, at 924.

28. Child Support 1991, *supra* note 19, at 8. According to Census statistics, 66% of noncustodial parents resided in the same state as their children with whom they did not live, 19.7% resided in different states, and the remaining 14.2% resided overseas or at an unknown residence. *Id.*

29. U.S. General Accounting Office, GAO/HRD-92-39FS, Interstate Child Support: Mothers Report Receiving Less Support From Out-of-State Fathers 13 (1992) [hereinafter GAO Report].

30. *See* Congressional Report, *supra* note 17, at 71. This number, however, may be overstated. According to a General Accounting Office report, mothers in interstate cases received only $2.4 billion of the expected $4.0 billion (60%) in child support payments. GAO Report, *supra* note 29, at 16. Mothers in intrastate cases received $7.0 billion of the $10.0 billion expected (70%). *Id.*

31. GAO Report, *supra* note 29, at 15. Thirty-four percent of mothers in interstate cases never received support payments in 1989, compared with 19% of mothers in intrastate cases. *Id.* at 3.

32. *Id.* at 15.

33. *See supra* text accompanying note 24.

This staggering amount reflects the many obstacles to enforcing an interstate child support order. The first difficulty is encountered in civil suits brought against the noncustodial parent by the child or one suing on the child's behalf.[34] Frequently in such cases, states do not have jurisdiction over the nonresident defendant.[35] The Supreme Court, in *Kulko v. Superior Court*,[36] held that the mere showing of a child's presence in the state is not by itself an adequate jurisdictional basis for a support award in favor of the child against the nonresident parent.[37] The assertion of child support jurisdiction over a nonresident defendant is limited to cases in which the defendant has had significant contacts with the forum state.[38] Consequently, delays may result when contacts to two states obfuscate which state's court has jurisdiction to enter an order.[39]

Furthermore, although the custodial parent conceivably could sue the noncustodial parent in federal court pursuant to diversity of citizenship, federal courts are particularly reluctant to hear domestic relations cases.[40] Federal district courts have jurisdiction to enforce court orders for child support after approval by the Secretary of Health and Human Services, but this path may be taken only when it has been found that the nonresident parent's state has failed to enforce the order and that the federal courts provide the only reasonable method for enforcing the order.[41]

When long-arm jurisdiction over the nonresident defendant is unavailable, the custodial parent and child often rely on the Uniform Reciprocal Enforcement of Support Act ("URESA").[42] URESA, some form of which is available in all states,[43] provides a uniform process for using the courts of another state without traveling to that state or becoming subject to jurisdiction in that state.[44] URESA works as

34. *See* Supporting Our Children, *supra* note 25, at 78-79.

35. *See* Roberts, *supra* note 17, at 14.

36. 436 U.S. 84 (1978).

37. *Id.* at 101; David D. Siegel, New York Practice § 106, at 168 (2d ed. 1991). All states have long-arm statutes for conferring jurisdiction; in addition, according to the U.S. Commission on Interstate Child Support, about half of the states have specific long-arm statutes for child support enforcement against a noncustodial parent. Supporting Our Children, *supra* note 25, at 79. The reach of these long-arm statutes, however, is limited by the Due Process Clause of the Fourteenth Amendment and by *Kulko*. *Id.*

38. *Kulko*, 436 U.S. at 92; Supporting Our Children, *supra* note 25, at 80.

39. *See* Roberts, *supra* note 17, at 28.

40. Supporting Our Children, *supra* note 25, at 79; *see also* Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (discussing the validity of a domestic relations exception to federal jurisdiction). Furthermore, a child support claimant may be unable to meet the $50,000 amount in controversy requirement for diversity cases. *See* 28 U.S.C. § 1332 (1988).

41. *See* 42 U.S.C. §§ 652(a)(8), 660; 1 Clark, *supra* note 19, § 7.2, at 440.

42. *See* 1 Clark, *supra* note 19, § 18.4, at 406-07.

43. Julieanne Griffin, How To Collect Your Child Support 24 (1995).

44. *Id.* at 70.

follows: The custodial parent files a petition in her own state (the initiating jurisdiction).[45] When the court in the initiating jurisdiction determines that: (1) the absent parent owes child support; and (2) the court in the absent parent's state has jurisdiction over him or his property, the petition is forwarded to the absent parent's state (the responding jurisdiction).[46] If the responding jurisdiction is able to locate the parent, the court will hold a hearing, after which it will enter a support order.[47]

Despite its just aims, in many instances URESA does not work well.[48] Variations in state laws may result in the responding state's order not receiving full faith and credit in the courts of the initiating jurisdiction.[49] Moreover, when circumstances change after the initiating jurisdiction issues its order, the amount of support may be reduced by the responding jurisdiction.[50] Finally, a URESA order does not nullify and is not nullified by another support order; therefore, conflicting support orders between the same parties may result.[51]

In addition to URESA, the Child Support Enforcement ("CSE") Program, under Title IV-D of the Social Security Act,[52] provides for a joint federal, state, and local effort to collect support from parents who are legally obligated to pay.[53] Each state has a CSE agency to locate noncustodial parents, establish paternity, establish, enforce and modify support orders, and collect child support payments.[54] Unfortunately, these agencies are understaffed, underfunded, and largely ineffective in interstate cases because of conflicting state systems.[55] Discrepancies in support guidelines between states result in variances in the amount of support awarded, providing incentives for noncustodial parents to move to states where they would have smaller payment obligations.[56] Furthermore, according to a 1991 study, many local CSE agencies do not provide services to families who do not

45. *Id.* at 71.
46. *Id.* at 71.
47. *Id.* at 72.
48. 1 Clark, *supra* note 19, § 7.6, at 488. For example, one persistent problem has been delays in processing a URESA case. *See* Supporting Our Children, *supra* note 25, at 229. These delays may be due, in part, to a lack of cooperation between the initiating and responding jurisdictions. *See id.* at 229-230.
49. Calhoun, *supra* note 26, at 927.
50. Griffin, *supra* note 43, at 24.
51. Margaret C. Haynes, *Obtaining Jurisdiction in Child Support Cases*, Fair$hare, July 1993, at 4, 6
52. Pub. L. No. 93-647, 88 Stat. 2351 (1975) (codified as amended at 42 U.S.C. §§ 651-669 (1988 & Supp. V 1993)).
53. U.S. Dep't of Health and Human Services, The Child Support Recovery Act of 1992 [hereinafter CSRA Summary].
54. *Id.*
55. Paula Roberts, *The Case For Fundamental Child Support Reform*, Fair$hare, July 1993, at 8, 8.
56. Roberts, *supra* note 17, at 27 ("With 54 different sets of guidelines in effect, there is little equity among similarly situated families who live in different states.").

receive Aid to Families With Dependent Children ("AFDC") benefits.[57]

Other problems are more pronounced in interstate cases. For example, interstate enforcement efforts have been hindered by conflicting state regulations, confusing federal requirements, and burdensome caseloads.[58] Furthermore, locating the noncustodial parent often proves to be difficult. Many support orders are never processed because a state lacks sophisticated computer systems that would provide employment, tax, and credit reports to aid in locating absent parents.[59] While the Child Support Enforcement Amendments of 1984[60] and the Family Support Act of 1988[61] have facilitated child support collection through federal tax refund offsets, state tax refund offsets, unemployment compensation intercepts, and direct wage withholding,[62] these means of collection often are hindered by difficulties in locating the noncustodial parent and by issues regarding which court or agency has jurisdiction.[63]

The more than 2.5 million custodial parents who do not receive full payment, accounting for more than $5 billion in unpaid support obligations, demonstrates that existing programs are not adequately addressing the child support enforcement problem.[64] The problem stems in part from our federalist system of co-equal state governments; each state's respect for the other's autonomy exacerbates the interstate collection process. The ramifications can be tumultuous. For families, the inability to collect child support may result in a lack of money to spend for a child's necessities, including food, clothing, and shelter.[65] For state and federal governments, expenditures for public benefits increase, draining financial resources that could be

57. *Id.* at 26.

58. Calhoun, *supra* note 26, at 924.

59. Roberts, *supra* note 17, at 26.

60. Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 26 U.S.C. & 42 U.S.C.).

61. Pub. L. No. 100-485, 102 Stat. 2343 (1988) (codified as amended in scattered sections of 42 U.S.C.).

62. Legislative History, *supra* note 5, at 5. From 1989 to 1993, national wage withholding collections more than doubled. Wage withholding collections totaled $4.7 billion in 1993, making it the most powerful collection method for obtaining child support payments. Congressional Report, *supra* note 17, at 20. The second most effective collection method is federal income tax refund offsets, which accounted for nationwide collections of more than $609 million in 1993. *Id.* at 39.

63. *See* Roberts, *supra* note 17, at 28.

64. *See supra* notes 23-24 and accompanying text.

65. *See* Roberts, *supra* note 17, at 26-27. A 1992 study based on interviews with low and moderate-income women demonstrates the gravity of the problem. Within the first year after the father left the household, 32% of children were without adequate food, 37% were without proper clothing, 55% lacked medical care, 57% lost their regular child care, and nearly half lost their housing. *Id.*

used elsewhere in the economy.[66] From both social and economic standpoints, nonsupport imposes significant costs on society.

II. CONGRESS'S RESPONSE: A FEDERAL CRIMINAL NONSUPPORT STATUTE

In response to the states' ineffectiveness in enforcing child support awards, Representative Henry Hyde introduced a bill designed to punish deadbeat parents and improve child support collection.[67] In 1992, Congress passed, and President George Bush signed into law,[68] the CSRA.[69] In signing this law that makes failure to pay child support a federal crime, the President noted the more than $5 billion in child support that goes unpaid in the United States each year and the resulting reliance of these families on the welfare system.[70]

Criminal sanctions for nonsupport have numerous advantages over the various civil remedies available for enforcing child support orders. First, the local prosecutor may provide swifter enforcement than the often backlogged child support agency.[71] Second, criminal enforcement may reduce recidivism for the particular defendant and deter the general population from committing the crime.[72] Third, in interstate cases, the threat of extradition may encourage a defendant to comply with a court order.[73] Finally, making nonsupport a crime demonstrates that the nation recognizes the seriousness of the child support

66. *See* Andrea H. Beller & John W. Graham, Small Change: The Economics of Child Support 233 (1993); *see also infra* notes 249-50 and accompanying text (discussing the relationship between the failure to pay child support and increased public assistance). Between 1970 and 1992, the number of AFDC recipients increased by 83%, from 7.4 million to 13.6 million, and the number of families receiving AFDC increased by 150%, from 1.9 million to 4.8 million. Congressional Report, *supra* note 17, at 6.

Too often, however, public benefits do not adequately substitute for uncollected support payments. Many families with working mothers are not eligible for AFDC. Roberts, *supra* note 17, at 6. Moreover, the average monthly AFDC benefit per family has been declining. According to the U.S. Department of Health and Human Services, the average AFDC benefit per family, after accounting for inflation, was $644 in 1970, but only $388 in 1992. Congressional Report, *supra* note 17, at 6. Current welfare reform may abolish or severely disable AFDC, further aggravating the problem. *See* Robert Pear, *House Committee Completes Plan to Overhaul Welfare*, N.Y. Times, Mar. 4, 1995, at 9.

67. *Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support: Hearing on H.R. 1241 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 8-11 (1992).

68. Statement on Signing the Child Support Recovery Act of 1992, 28 Weekly Comp. Pres. Doc. 2122 (Oct. 25, 1992) [hereinafter Statement By President Bush].

69. 18 U.S.C. § 228 (1994).

70. Statement By President Bush, *supra* note 68, at 2122.

71. Eleanor H. Landstreet, *State and Federal Criminal Nonsupport Prosecution*, Fair$hare, July 1993, at 16, 16.

72. *Id.*

73. *Id.*

enforcement problem and is willing to respond to it in a forceful manner.

A. *The Elements of the CSRA*

The CSRA marks a major change from other child support legislation because it makes the failure to pay child support a *federal* crime. While almost all states have laws making nonsupport a crime,[74] these statutes are largely ineffective in interstate cases.[75] The major limitation of these state laws is the jurisdictional hurdle—one state cannot prosecute for the violation of another state's order.[76]

The CSRA provides that "[w]hoever willfully fails to pay a past due support obligation with respect to a child who resides in another State shall be punished" with a fine or imprisonment.[77] To be punishable under the Act, the past-due child support obligation must be either greater than $5000 or must have remained unpaid for more than one year.[78] Interstate flight by a defendant is not an element of the offense;[79] a noncustodial parent, therefore, may be eligible for prosecution even if the custodial parent relocates to a different state.

A first offense under the CSRA is a misdemeanor punishable by a fine of up to $5000 or imprisonment for not more than six months, or both.[80] For a second or subsequent conviction, a defendant may be fined up to $250,000 and imprisoned for not more than two years.[81]

The CSRA is intended to supplement other child support enforcement programs already in existence, particularly the CSE Program.[82] Generally, cases that are accepted for federal prosecution are those that have proven unenforceable using the means available through the CSE program.[83] An individual applying directly to the U.S. Attorney's Office may be referred to her state or local CSE Office to ensure that alternative remedies have been attempted.[84] After the CSE Office screens a case, the matter is referred to the U.S. Attorney's Of-

74. Griffin, *supra* note 43, at 30. According to the Association for Children for Enforcement of Support, at least 42 states have made willful failure to pay child support a crime. Legislative History, *supra* note 5, at 5-6.

75. Griffin, *supra* note 43, at 30.

76. *Id.*

77. 18 U.S.C. § 228 (a), (b) (1994).

78. *Id.* § 228(d)(1)(B).

79. Memorandum from the Office of the Attorney General, Janet Reno, to United States Attorneys: Prosecutive Guidelines and Procedures for the Child Support Recovery Act of 1992, at 1 (July 13, 1993) (on file with the *Fordham Law Review*) [hereinafter Prosecutive Guidelines].

80. *See* 18 U.S.C. §§ 228(b)(1), 3559(a)(7), 3571(b)(6) (1994).

81. *See id.* §§ 228(b)(2), 3559(a)(5), 3571(b)(4).

82. CSRA Summary, *supra* note 53; *see supra* notes 52-57 and accompanying text.

83. CSRA Summary, *supra* note 53.

84. *Id.*

fice, which will prosecute only if "all reasonably available remedies have been exhausted."[85]

Before the U.S. Attorney will prosecute an alleged deadbeat parent, a letter is sent to the potential defendant advising him of the apparent CSRA violation and requesting payment of the support obligation within a specified period.[86] If payment is not made, the matter is referred to the Federal Bureau of Investigation.[87] Prior to filing charges, a second letter is sent to the would-be defendant, advising him that charges will be filed against him unless he makes payment within a specified period of time.[88] If payment still is not forthcoming and there is no adequate explanation for nonpayment, the U.S. Attorney will charge the parent with violating the CSRA.[89]

Once charges are filed, in order to convict a defendant under the CSRA, the United States must prove five elements. Guidelines require that: (1) a known past-due support obligation exists; (2) the obligation is either greater than $5000 or has remained unpaid for longer than one year; (3) the defendant had the ability to pay the obligation; (4) the defendant willfully failed to pay the obligation; and (5) the child resides in another state.[90]

B. *The Limited Use of the CSRA*

Recently, the CSRA received significant publicity following the arrest of a New York man who fled to Vermont to avoid paying over $580,000 in past-due child support.[91] The arrest received national attention, with the defendant, Jeffrey A. Nichols, earning the infamous title of "America's Worst Deadbeat Dad."[92] Nichols was the first person to be prosecuted in New York City under the Act.[93] Slightly more than fifty cases have been prosecuted nationwide, with fewer than half resulting in convictions.[94]

One reason the CSRA is used so sparingly is the requirement that willfulness be established. The government must prove that the defendant "knew about the obligation, was financially able to meet it at

85. Prosecutive Guidelines, *supra* note 79, at 4.
86. *Id.* at 5.
87. *Id.* at 6.
88. *Id.* at 6.
89. *Id.*
90. *Id.* at 1.
91. *See* James C. McKinley Jr., *Investment Adviser Jailed in Child Support Case*, N.Y. Times, Aug. 15, 1995, at B1.
92. People, Sept. 4, 1995, at cover. The government hoped that Nichols's prosecution would deter deadbeat parents. Some children's advocates have argued, however, that low and middle-income parents may feel that only the most egregious cases will be prosecuted. *See* Sheila A. Feeney, *Law's Still Easy to (Dead)beat*, N.Y. Daily News, Oct. 3, 1995, at 43.
93. McKinley, *supra* note 91, at B4.
94. Feeney, *supra* note 92, at 43. According to a Justice Department spokesman, however, there are almost 500 matters under investigation. *Id.*

the time it was due, and intentionally did not pay it."[95] For purposes of the CSRA, "willfulness is the knowing and intentional violation of a known legal duty."[96] "Willfulness cannot be presumed from non-payment alone,"[97] but partial payment may negate willfulness by suggesting that the defendant did not have the financial resources to fulfill the entire obligation.[98] The willfulness standard is difficult to meet, and for this reason, in part, many CSRA cases involve instances of tax, bank, or bankruptcy fraud.[99]

Furthermore, guidelines issued by the U.S. Department of Justice regarding implementation of the CSRA give some indication why the statute is used so infrequently. As discussed above, federal prosecution is favored where all reasonably available civil and state remedies have been exhausted or where state remedies have proven ineffective.[100] Attorney General Janet Reno wrote that the Justice Department guidelines were "intended to ensure effective prosecution of the CSRA by providing a means for selecting egregious cases which states are unable to handle because of the interstate nature of the case."[101] Priority is given if a would-be defendant: (1) moves from state to state to avoid payment; (2) changes employment, conceals his assets or location, or uses false social security numbers; (3) fails to make support payments after being held in contempt of court; or (4) commits some other federal offense such as tax, bank, or bankruptcy fraud.[102]

Finally, another reason why the CSRA is seldom utilized is that Congress has not appropriated sufficient funds to cover the cost of prosecuting the millions of deadbeat parents.[103] Some U.S. Attorneys also have cited lack of time to train and prepare their staffs for increased caseloads as a contributing factor.[104]

III. The Commerce Clause

The putative constitutional basis for the CSRA is Article I, Section 8 of the United States Constitution, commonly referred to as the Commerce Clause.[105] It provides in part that Congress shall have the power to "regulate Commerce . . . among the several States."[106] The

95. CSRA Summary, *supra* note 53.
96. Prosecutive Guidelines, *supra* note 79, at 2 (citing Cheek v. United States, 498 U.S. 192, 201 (1991)).
97. *Id.* (citation omitted).
98. *Id.*
99. *See infra* text accompanying note 102.
100. *See supra* notes 82-85 and accompanying text.
101. Prosecutive Guidelines, *supra* note 79, at 1.
102. *Id.* at 4-5; CSRA Summary, *supra* note 53.
103. Feeney, *supra* note 92, at 43.
104. *Id.*
105. *See supra* note 6 and accompanying text.
106. U.S. Const. art. I, § 8, cl. 3.

Supreme Court first defined the nature of Congress's commerce power in 1824 in *Gibbons v. Ogden*.[107] There, the Court held: "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[108]

For years following the New Deal, the Court took an expansive view of "commerce" and upheld a broad spectrum of legislation dealing with national economic and social issues, including laws in areas such as criminal law and civil rights.[109] The motive for such legislation need not have been a commercial one, but rather one of morality or social utility.[110] *United States v. Lopez*,[111] which held unconstitutional the Gun-Free School Zones Act of 1990,[112] appears to have been an exception to the Court's expansive interpretation of the Commerce Clause. The decision marked the first time since 1936 that the Court invalidated an act of Congress as beyond the scope of the Commerce Clause.[113] *Lopez* also represented a new reluctance on the part of the Court to defer to Congress's definition of what "interstate commerce" means.[114] A brief discussion of the expansion of Congress's commerce power and the radical shift embodied in *Lopez* follows.

A. *Commerce Clause Jurisprudence Before* Lopez

Decisions prior to *Lopez* demonstrate the expansive nature of Congress's power to regulate commerce and the deference the Court gave to Congress to enact legislation pursuant to this power. The Court considered Congress the more capable branch of government for defining national commercial problems and developing solutions to those problems.[115]

For example, in 1937 the Court found that the power to regulate commerce could include more traditionally intrastate activities. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[116]

107. 22 U.S. (9 Wheat.) 1 (1824).

108. *Id.* at 188.

109. 1 Rotunda & Nowak, *supra* note 7, § 4.8, at 400; *see infra* notes 130-48 and accompanying text.

110. *See* 1 Rotunda & Nowak, *supra* note 7, §§ 4.8, 4.10, at 400, 411-16.

111. 115 S. Ct. 1624 (1995).

112. *Id.* at 1626.

113. *See supra* note 9 and accompanying text.

114. *See* Editorial, *The High Court Loses Restraint*, N.Y. Times, Apr. 29, 1995, at 22 [hereinafter *Court Loses Restraint*]. Prior to *Lopez*, the Court upheld acts of Congress provided there was a rational argument upon which Congress could find a relation between the regulated activity and interstate commerce. 1 Rotunda & Nowak, *supra* note 7, § 4.8, at 395.

115. *See* 1 Rotunda & Nowak, *supra* note 7, § 4.1, at 356.

116. 301 U.S. 1 (1937).

the Court upheld the National Labor Relations Act of 1935[117] against an employer's unfair labor practices.[118] The Court held that Congress may regulate intrastate activities that have "a close and substantial relation to interstate commerce."[119]

Four years later, Commerce Clause jurisprudence took another significant stride when, in *United States v. Darby*,[120] the Court upheld the Fair Labor Standards Act of 1938,[121] which set minimum wage and maximum hour standards for employees engaged in the production of goods for interstate commerce.[122] The Court disregarded Congress's motive for enacting the statute, referring to motive as a matter of legislative judgment upon which the courts have no control.[123] The Court held that Congress's commerce power extends to intrastate activities which "affect interstate commerce or the exercise of the power of Congress over it."[124]

The Court's most expansive interpretation of the Commerce Clause, however, probably came in 1942, in *Wickard v. Filburn*.[125] *Wickard* involved Congress's right to establish quotas on the raising of wheat pursuant to the Agricultural Adjustment Act of 1938.[126] The owner of a small farm challenged the government's right to limit the amount of wheat grown on his farm and consumed on the premises.[127] The Court found that wheat grown for home consumption would substantially affect price and market conditions by supplying the needs of the farmer which otherwise would be supplied by outside purchases.[128] The Court established the "aggregative effect" principle: while one farmer's effect on the wheat market may not be substantial, "taken together with that of many others similarly situated, [it] is far from trivial."[129]

Furthermore, *Heart of Atlanta Motel v. United States*[130] demonstrates Congress's ability to enact statutes whose primary purpose is not commercial. The Court upheld an application of Title II of the

117. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988 & Supp. V 1993)).

118. *Jones & Laughlin*, 301 U.S. at 49.

119. *Id.* at 37.

120. 312 U.S. 100 (1941) (overruling Hammer v. Dagenhart, 247 U.S. 251 (1918)).

121. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993)).

122. *Darby*, 312 U.S. at 109-10, 125.

123. *Id.* at 115.

124. *Id.* at 118.

125. 317 U.S. 111 (1942).

126. Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified as amended in scattered sections of 7 U.S.C.); *see Wickard*, 317 U.S. at 114-15.

127. *Wickard*, 317 U.S. at 113-14.

128. *Id.* at 127-28.

129. *Id.* at 128.

130. 379 U.S. 241 (1964).

Civil Rights Act of 1964[131] to a motel which refused to rent rooms to African Americans.[132] The motel was located near interstate highways, advertised nationally, and derived seventy-five percent of its business from out-of-state guests.[133] The Court reasoned that racial discrimination adversely affected interstate commerce by impeding the interstate travel of African Americans.[134] Although the operation of a motel may be considered a local activity, "The power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[135] Moreover, the fact that Title II principally regulated a moral and social wrong did not restrict Congress from enacting the statute.[136] The Court deferred to Congress's judgment to enact legislation; because Congress had a rational basis for finding that racial discrimination affected commerce and the means selected to eliminate discrimination were reasonable and appropriate, the statute was upheld.[137]

Similarly, *Katzenbach v. McClung*[138] upheld an application of Title II to Ollie's Barbecue, a family-owned restaurant.[139] The restaurant was located relatively far from an interstate highway and received no appreciable business from out-of-state customers, yet purchased forty-six percent of its meat from a supplier that bought from out-of-state sources.[140] The Court again deferred to Congress, stating that all that was needed to uphold the statute was a rational basis to find that racial discrimination adversely affected the flow of interstate commerce.[141] Returning to the reasoning employed in *Wickard*, the Court held that although the value of food purchased by Ollie's Barbecue that had traveled in interstate commerce was by itself insignificant, the restaurant's discriminatory conduct was representative of similar conduct throughout the country.[142] This conduct, in the aggregate, had a substantial effect upon interstate commerce.[143]

131. Pub. L. No. 88-352, 78 Stat. 241, 243-46 (1964) (codified as amended at 42 U.S.C. §§ 2000a-2000b (1988) (providing for injunctive relief against discrimination on the basis of race, color, religion, or national origin in places of public accommodation)).

132. *Heart of Atlanta Motel*, 379 U.S. at 243, 261.

133. *Id.* at 243.

134. *Id.* at 253.

135. *Id.* at 258.

136. *Id.* at 257.

137. *Id.* at 258-59.

138. 379 U.S. 294 (1964).

139. *Id.* at 296.

140. *Id.* at 296-98.

141. *Id.* at 303-04.

142. *Id.* at 301; *see supra* text accompanying notes 125-29.

143. *See Katzenbach*, 379 U.S. at 301.

Finally, *Perez v. United States*[144] exemplified the Court's willingness to defer to Congressional findings. The Court upheld Title II of the Consumer Credit Protection Act,[145] which made extortionate credit transactions a federal crime.[146] The Court found that the transactions, otherwise known as loan sharking, accounted for a substantial proportion of the income accumulated by organized crime syndicates, many of which were interstate in character.[147] Congressional findings stated that although the transactions were purely intrastate, they nevertheless directly affected interstate commerce.[148]

Thus, the Court has held that Congress is empowered to legislate in areas such as labor relations, civil rights, and criminal law. As long as Congress found some rational relationship and an aggregate substantial effect between the activity being regulated and interstate commerce, it could legislate pursuant to its commerce power.

B. United States v. Lopez[149]

Although the above-mentioned cases represented a continuous expansion of Congress's commerce power, the Supreme Court appears to have taken a more restrictive view of that power in *Lopez*. While *Lopez* did not overrule earlier Commerce Clause cases, the decision represented a substantial departure from earlier interpretations of the Commerce Clause.[150]

The defendant in *Lopez* had been convicted of violating the Gun-Free School Zones Act of 1990 ("GFSZA"),[151] which made the possession of a gun "at a place that [an] individual knows, or has reasonable cause to believe, is a school zone" a federal crime.[152] The Fifth Circuit reversed the defendant's conviction, finding that the CSRA was an unconstitutional exercise of Congress's Commerce Clause power.[153]

On appeal to the Supreme Court, the government argued that the GFSZA was within Congress's commerce power because the statute regulated an activity which "substantially affect[ed] interstate commerce."[154] The government suggested a "costs of crime" nexus—that the possession of guns in a school zone would result in an increase in

144. 402 U.S. 146 (1971).
145. Pub. L. No. 90-321, 82 Stat. 146, 159-64 (1968) (codified as amended at 18 U.S.C. §§ 891-896 (1994)).
146. *Perez*, 402 U.S. at 146-47.
147. *See id.* at 155-57.
148. *Id.* at 156. The Court indicated, however, that Congress would not have been required to make particularized findings in order to enact the statute. *Id.*
149. 115 S. Ct. 1624 (1995).
150. *See Court Loses Restraint*, *supra* note 114, at 22.
151. 18 U.S.C. § 922(q) (1994); *see Lopez*, 115 S. Ct. at 1626.
152. 18 U.S.C. § 922(q)(2)(A).
153. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).
154. *Lopez*, 115 S. Ct. at 1632

violent crime, which in turn would decrease travel to unsafe areas and increase societal costs through higher insurance rates.[155] Furthermore, under a "national productivity" reasoning, the government asserted that firearm possession would threaten the learning environment, which in turn would create a less productive citizenry and adversely affect the nation's economic well-being.[156]

The Court rejected these arguments, and in a 5-4 decision, affirmed the Fifth Circuit's ruling that the GFSZA was an unconstitutional exercise of Congress's commerce power.[157] The Court held that because the defendant was a local student at a local school, and because the statute did not require that the possession of the firearm have any nexus to interstate commerce, Congress was not authorized to enact the GFSZA.[158] In order to uphold the statute, the Court "would have to pile inference upon inference . . . to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[159] The possession of a handgun on school grounds was not "an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[160]

To reach its conclusion, the Court identified three broad categories that Congress may regulate under its commerce power:

> First, Congress may regulate the use of channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[161]

The Court quickly dismissed the first two categories: Chief Justice Rehnquist, writing for the majority, stated that the GFSZA "is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor [is it] a regulation . . . to protect an instrumentality of interstate commerce or a thing in interstate commerce."[162]

The Court, therefore, concluded that if the GFSZA was to be upheld, it would have to be sustained as a regulation of an activity that substantially affected interstate commerce.[163] Relying on the third

155. *Id.*
156. *Id.*
157. *Id.* at 1626.
158. *Id.* at 1634.
159. *Id.*
160. *Id.*
161. *Id.* at 1629-30 (citations omitted).
162. *Id.* at 1630.
163. *Id.*

category, however, the Court did not find a substantial effect on interstate commerce and, accordingly, struck down the statute.

First, the Court held that the GFSZA "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[164] If the Court were to accept the government's "costs of crime" argument, Congress would be able to regulate "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."[165] Similarly, acceptance of the government's "national productivity" reasoning would permit Congress to regulate any activity that it found was related to the economic productivity of individual citizens, including marriage, divorce, and child custody, which typically are within the province of the states.[166] The Court voiced concern that without some limit on congressional power under the Commerce Clause, there would be few restrictions on federal power.[167]

The Court also found that the GFSZA was not an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[168] Because the statute did not regulate commercial activity, it could not be sustained under the rationale ingrained in cases like *Wickard* which upheld regulations of activities that arose out of or were connected with a commercial transaction that when "viewed in the aggregate, substantially affect[ed] interstate commerce."[169]

Second, the Court held that the GFSZA "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce."[170] Absent some jurisdictional element, the relationship between interstate commerce and any firearm in the possession of a high school student was too attenuated to justify Congress's intrusion into a criminal matter of primarily local concern.[171]

Finally, the Court reasoned that the government had conceded that neither the statute nor its legislative history contained any findings concerning the effects upon interstate commerce of a gun in a school zone.[172] While the omission of formal findings as to the substantial burden an activity has on interstate commerce was not dispositive, the presence of such findings would have enabled the Court to evaluate

164. *Id.* at 1630-31 (footnote omitted).
165. *Id.* at 1632 (citation omitted).
166. *Id.*
167. *Id.*
168. *Id.* at 1631.
169. *Id.*; *see supra* text accompanying notes 125-29.
170. *Lopez*, 115 S. Ct. at 1631.
171. United States v. Murphy, 893 F. Supp. 614, 616 (1995) (discussing *Lopez*).
172. *Lopez*, 115 S. Ct. at 1631.

Congress's judgment that the activity in question affected interstate commerce.[173]

IV. POST-*LOPEZ* CHALLENGES TO THE CSRA

Lopez marked a change from previous Commerce Clause jurisprudence. As a result of the decision, the validity of previously settled law has been called into question.[174] Among the statutes potentially affected by the *Lopez* about-face is the CSRA.

Because Congress enacted the CSRA pursuant to its commerce power, the validity of the Act depends upon the presence of some significant relationship between child support and interstate commerce. In light of *Lopez*, a number of district courts have heard challenges to the CSRA.[175]

A. *Courts Holding the CSRA Unconstitutional*

The immediate impact of *Lopez* has been to divide the courts on the constitutionality of the CSRA. Thus far, three district courts, relying on the change in Commerce Clause analysis introduced by *Lopez*, have held the CSRA unconstitutional.

The first decision to declare the CSRA unconstitutional was *United States v. Schroeder*.[176] The facts of *Schroeder* are as follows: In April 1992, the Arizona Superior Court ordered the defendant to pay $759 per month in support to his ex-wife and children.[177] Almost three years later, the defendant, who had moved to Illinois, owed more than $24,000 in past-due support.[178] The defendant was indicted under the CSRA, but Judge Rosenblatt of the United States District Court for the District of Arizona dismissed the indictment in light of *Lopez*.[179]

In granting the defendant's motion to dismiss, the court in *Schroeder* relied upon the three categories enumerated in *Lopez* to determine whether a federal statute is constitutional under the Commerce Clause: "Congress may regulate the use of channels of interstate commerce . . . protect the instrumentalities of interstate commerce . . . [and] regulate those activities having a substantial relation to interstate commerce."[180] The court found that in order to uphold the CSRA, the collection of past-due child support payments, like the

173. *Id.* at 1631-32.

174. *See Court Loses Restraint*, *supra* note 114, at 22.

175. The challenges to the CSRA are multiplying rapidly. In addition to the cases analyzed below, other courts are likely to reach decisions regarding the constitutionality of the Act in the near future.

176. 894 F. Supp. 360 (D. Ariz. 1995). The court issued a virtually identical companion opinion on the same day. *See* United States v. Mussari, 894 F. Supp. 1360 (D. Ariz. 1995).

177. *Schroeder*, 894 F. Supp. at 361-62.

178. *Id.* at 362.

179. *Id.*

180. *Id.* at 363 (quoting United States v. Lopez, 115 S. Ct. 1624, 1629-30 (1995)).

possession of a firearm in *Lopez*, would have to fit into the third category, i.e., it must have a "substantial relation to interstate commerce."[181]

Judge Rosenblatt did not find a substantial relation to interstate commerce, and held the CSRA unconstitutional under the Commerce Clause.[182] In reaching this conclusion, the court examined four principle areas: (1) the criminal nature of the CSRA; (2) the adequacy of the nexus between interstate commerce and the parent and child living in different states; (3) the effect of nonsupport on federal monies; and (4) the legislative history of the statute.[183]

First, the court held that the CSRA, like the GFSZA, "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[184] The court emphasized that numerous states have criminal nonsupport statutes.[185] "To allow Congress to pass a national criminal statute addressing this area would allow Congress to usurp the authority of those States which have chosen specifically not to criminalize the failure to pay child support payments . . . ."[186] These states have contemplated the pros and cons of enacting a criminal nonsupport

181. *Id.* at 364.

182. *Id.* at 368-69. Aside from holding that the CSRA was invalid under the Commerce Clause, the court in *Schroeder* also held that the CSRA violated the Tenth Amendment and was unconstitutional based on principles of federalism and comity. *Id.* at 367-68. This Note examines the constitutionality of the CSRA exclusively under the Commerce Clause; a thorough discussion of federalism and comity is beyond its scope. The issues of federalism and comity, however, were addressed in United States v. Hopper, 899 F. Supp. 389 (S.D. Ind. 1995), where the court upheld the CSRA. The court stated that:

> While principles of federalism and comity do suggest that federal courts should generally not interfere with state criminal prosecutions, and other state law functions, this Court can find no case where those "principles" were held to be grounds to declare an act of Congress unconstitutional. The principles of federalism and comity are made evident in a concrete manner when a federal court "abstains" from taking certain actions or deciding certain cases.

Hopper, 899 F. Supp. at 393; *see also infra* text accompanying notes 222-28 (analyzing *Hopper* under the Commerce Clause). Moreover, although federal courts are reluctant to exercise diversity jurisdiction in domestic relations cases, any domestic relations exception is applicable only where there exists no independent basis for federal jurisdiction beyond diversity of citizenship. United States v. Hampshire, 892 F. Supp. 1327, 1330 (D. Kan. 1995); *see also infra* text accompanying notes 203-10 (analyzing *Hampshire* under the Commerce Clause). If Congress were permitted to enact the CSRA pursuant to its commerce power, the Act would by definition be a federal question. *See* United States v. Sage, No. 3:95CR108 (DJS), 1995 WL 627950, at *5 (D. Conn. Oct. 3, 1995); *see also* infra text accompanying notes 229-35 (analyzing *Sage* under the Commerce Clause).

183. *Schroeder*, 894 F. Supp. at 364-67.

184. *Id.* at 364 (quoting *Lopez*, 115 S. Ct. at 1630-31).

185. *Id.* (footnote omitted).

186. *Id.*

statute and, for whatever reason, have specifically chosen not to do so.[187]

Second, the court found that the CSRA's jurisdictional element, which requires that the noncustodial parent and the child reside in different states, did not establish a substantial relation to interstate commerce.[188] The court held that the Act "is clearly not tailored to address only those parents who specifically flee from a state in order to avoid paying child support."[189] The prosecutor need not prove intent to flee on the part of the parent obligated to pay support, and CSRA prosecution is possible when the custodial parent moves out of state while the noncustodial remains in his place of residence.[190] Thus, "[t]he nexus of requiring the non-paying parent and the child to live in different states goes beyond those cases the CSRA was aimed to address, namely parents who flee a state in an attempt to avoid child support payment."[191]

Third, the court rejected the argument that failure to pay child support payments affects federal monies.[192] The court noted the various civil remedies available for enforcing child support orders and reasoned that "[b]ecause the civil legislation is redressing the concerns claimed to be the basis for the necessity of the CSRA, [the government] has failed to show that the CSRA, a criminal statute, is substantially related to interstate commerce."[193]

Finally, the court found that no specific legislative history supported the argument that the CSRA was aimed at interstate commerce.[194] While the "legislative history evidences a consideration by Congress of the need for an interstate nexus when enacting this legislation . . . more is needed. There must be a substantial effect on interstate *commerce*."[195]

Less than three months after *Schroeder*, Judge Biery of the United States District Court for the Western District of Texas filed an opinion invalidating the CSRA in *United States v. Bailey*.[196] The court professed that "a statute which sounds, walks, and looks like a duck must be a duck statute. The CSRA sounds, walks, and looks like a domestic relations statute and aims the central government down a slippery slope where it should not be."[197] While not explicitly holding that the CSRA was beyond the scope of the Commerce Clause, the court con-

187. *Id.*
188. *Id.* at 364-65.
189. *Id.* at 365.
190. *Id.*
191. *Id.*
192. *Id.* at 365-67.
193. *Id.* at 366.
194. *Id.* at 367.
195. *Id.*
196. No. SA-95-CR-138, 1995 WL 630907 (W.D. Tex. Oct. 25, 1995).
197. *Id.* at *3 (citations omitted).

cluded that because *Lopez* rejected the "national productivity" argument asserted by the government, a reasonable inference could be made that the Supreme Court would find a federal criminal nonsupport statute invalid.[198]

Finally, in *United States v. Parker*,[199] Judge Bechtle of the United States District Court for the Eastern District of Pennsylvania rejected the argument that nonsupport affects interstate commerce increasing single parents' dependence on welfare and making it more difficult for these parents to afford necessities such as housing, food, and medical care.[200] Accordingly, the court declared that the Act was not a valid exercise of Congress's Commerce Clause power.[201] "Congress had no rational basis to conclude that the willful failure to pay a child support obligation substantially affects interstate commerce principally because that activity . . . 'has nothing to do with commerce or any sort of economic enterprise . . . .' "[202]

B. *Courts Holding the CSRA Constitutional*

While district courts in Arizona, Texas, and Pennsylvania have held that *Lopez* mandated a finding that the CSRA is unconstitutional, four other district courts have applied *Lopez* as precedent to reach the opposite conclusion. These courts thoroughly rejected the rationale of *Schroeder*, *Bailey*, and *Parker* and found that the Act constitutes a legitimate exercise of Congress's commerce power.

In *United States v. Hampshire*,[203] Judge Kelly of the United States District Court for the District of Kansas rejected a defendant's challenge to the constitutionality of the CSRA.[204] The court held that the CSRA is distinguishable from the GFSZA because the interstate nexus—the diversity between delinquent parent and child—clearly is identified in the statute.[205] Consequently, "The law has no application to domestic relations matters occurring entirely within a given state."[206]

Furthermore, the court implied that based upon the aggregate effect of the lack of payment, child support substantially affects interstate commerce.[207] In enacting the CSRA, the House of Representatives

198. *Id.* at *1; *see supra* text accompanying notes 156, 166. The court in *Bailey* explicitly declared the CSRA unconstitutional based on principles of federalism and comity. *Bailey*, 1995 WL 630907, at *3; *see supra* note 182 (discussing the inadequacy of federalism and comity as independent bases for invalidating the CSRA).

199. Crim. No. 95-352, 1995 WL 683215 (E.D. Pa. Oct. 30, 1995).

200. *Id.* at *6-8.

201. *Id.* at *13.

202. *Id.* at *4 (quoting United States v. Lopez, 115 S. Ct. 1624, 1630-31 (1995)).

203. 892 F. Supp. 1327 (D. Kan. 1995).

204. *Id.* at 1333.

205. *Id.* at 1329.

206. *Id.*

207. *See id.* (citing Wickard v. Filburn, 317 U.S. 111 (1942)); *see supra* text accompanying notes 125-29.

considered that "[t]he avoidance of child support obligations exacerbates the problem of child poverty" and requires additional government expenditures to remedy the problem.[208]

Thus, the court concluded that *Lopez* cannot be read to preclude all federal legislation touching upon domestic relations.[209] "Where . . . Congress has determined in a nonarbitrary manner that the willful actions of private individuals have a substantial effect on interstate commerce, it may constitutionally proscribe such actions by legislation which includes an interstate nexus as an explicit element of the offense."[210]

A decision similar to *Hampshire* was reached in *United States v. Murphy*,[211] where Judge Conrad of the United States District Court for the Western District of Virginia held that "*Lopez* does not prohibit Congress from enacting laws aimed at regulating the use of interstate travel as a means by which to avoid the legal obligations arising from family responsibilities."[212] The defendant in *Murphy*, one of Virginia's "Ten Most Wanted" child support evaders, fled from state to state to avoid paying almost five years' worth of child support to his ex-wife and daughter.[213] The court upheld the defendant's CSRA conviction.[214]

The court in *Murphy* emphasized the diversity component of the CSRA by stressing that in order to be convicted under the CSRA, the defendant must: (1) reside in a different state from that in which his dependent child resides; and (2) be required to transfer funds from one state to another.[215] The court held that the CSRA, unlike the GFSZA, has a jurisdictional element that ensures that a monetary transaction will take place across state lines and that the interests of residents in different states will come into play before the federal statute is invoked.[216] Furthermore, because a CSRA defendant frequently will have taken advantage of employment opportunities in the state in which he lives, the requirement that the defendant provide money to a child in another state has a substantial effect on interstate commerce.[217]

The court also drew parallels between the CSRA and other federal statutes that provide a penalty for fleeing across state lines.[218] Various

208. *Hampshire*, 892 F. Supp. at 1329-30.
209. *Id.* at 1330.
210. *Id.*
211. 893 F. Supp. 614 (W.D. Va. 1995).
212. *Id.* at 617.
213. Leslie Taylor, *Support Evaders Pursued*, Roanoke Times & World News, June 10, 1995, at C1.
214. *Murphy*, 893 F. Supp. at 617.
215. *Id.* at 616.
216. *Id.*
217. *Id.*
218. *Id.* The court analogized the CSRA to 18 U.S.C. § 1073 (1994), which provides that an individual may be prosecuted for fleeing a state to avoid prosecution or

courts have upheld such statutes pursuant to Congress's commerce power to criminalize activity involving interstate travel.[219] The CSRA, like these other criminal laws, "seem[s] to be aimed at preventing an individual from escaping either law enforcement officers or his own legal obligations by taking advantage of our federal system of government through flight to another state."[220] Moreover, although the custodial parent in a CSRA case may relocate while the noncustodial parent remains in-state, this did not occur in the defendant's situation. The defendant fled to another state, became employed there, and failed to make any payment of child support.[221]

Yet another court, the United States District Court for the Southern District of Indiana, upheld the CSRA under the Commerce Clause. In *United States v. Hopper*,[222] Judge Hussman emphasized that the jurisdictional element of the Act, which requires diversity between the noncustodial parent and the child, ensures that federal law enforcement authority cannot be invoked in intrastate cases.[223] Moreover, the jurisdictional element recognizes the sovereignty of each state in domestic relations and the limited power of states to reach beyond their borders to enforce child support obligations.[224]

The court also found that "the act of collecting an obligation, though dealing with an intangible, does amount to commerce."[225] Child support collection involves "a continuous and indivisible stream of intercourse among the states."[226] While the support order itself may be generated intrastate, a chain of events is set in motion "involving the transmission of large sums of money and communications by mail, telephone, and telegraph."[227] This chain of events provides a sufficient nexus to interstate commerce to uphold the statute.[228]

Finally, the court in *United States v. Sage*[229] held that the CSRA is constitutional because nonsupport substantially affects interstate commerce.[230] In upholding the Act, Judge Squatrito of the United States District Court for the District of Connecticut considered the "abundance of legislative history regarding the economic effects of the non-

a legal compulsion to testify. Furthermore, the court cited 18 U.S.C. § 1201 (1994), which provides that whoever willfully transports an abductee across state lines may be held criminally liable in federal court. *Murphy*, 893 F. Supp. at 616.

219. *Murphy*, 893 F. Supp. at 616.
220. *Id.*
221. *Id.*
222. 899 F. Supp. 389 (S.D. Ind. 1995).
223. *Id.* at 392.
224. *Id.*
225. *Id.*
226. *Id.* at 393.
227. *Id.*
228. *Id.*
229. No. 3:95CR108 (DJS), 1995 WL 627950 (D. Conn. Oct. 3, 1995).
230. *Id.* at *2.

payment of interstate [child] support."[231] Moreover, the court noted that the jurisdictional element of the CSRA assured that in each application of the Act a nexus to interstate commerce would exist.[232]

The court also held that although "[s]upport payments might not be considered traditional items of 'commerce,' . . . the non-payment of interstate support obligations is economic activity in a way that mere possession of a handgun in [a] school zone is not."[233] Nonpayment of support causes noncustodial parents to reap economic benefits, while children suffer corresponding economic losses.[234] In the aggregate, nonpayment causes vast changes in the consumption of interstate goods by parents and their children as well as a substantial shift in the interstate flow of goods.[235]

Thus, *Lopez* has divided the lower courts as to the constitutionality of the CSRA. This uncertainty must be resolved because interstate enforcement of child support orders is an endemic problem. If the CSRA is to solve, rather than exacerbate, this problem, its constitutionality must be firmly established. Otherwise, enforcement efforts will be delayed by litigation of the constitutional question as well as by the usual difficulties of interstate enforcement.

V. The Constitutionality Of The CSRA

The division among the district courts over the CSRA demonstrates the possibility that *Lopez* will have far-reaching consequences. For all its apparent radicalism, however, *Lopez* did not purport to overrule any of the Court's previous Commerce Clause decisions. The decisions enumerated in part III.A. of this Note remain "good law" and are applicable to an assessment of the constitutionality of the Act.

This Note argues that the CSRA is more akin to the statutes upheld in these cases than to the statute struck down in *Lopez*. Child support collection, unlike the possession of a gun, is an economic activity with both immediate and secondary effects on commerce.[236] While congressional findings accompanying the GFSZA may generously be described as sparse, the legislative history of the CSRA indicates that Congress's primary concern was the interstate aspect of the child support enforcement problem and its economic repercussions.[237] Moreover, the jurisdictional element of the CSRA, which requires diversity between the noncustodial parent and child, provides an interstate

231. *Id.* at *4.
232. *Id.* at *5.
233. *Id.* at *3 (citations omitted).
234. *Id.*
235. *Id.* at *4.
236. *See infra* notes 239-59 and accompanying text.
237. *See infra* notes 260-72 and accompanying text.

nexus that was lacking in the GFSZA.[238] This section will examine these distinctions.

A. *The Economics of Child Support*

Nonsupport influences the flow of money in interstate commerce and affects the poverty level and public assistance expenditures. Most importantly, from a constitutional standpoint, the child support payment obligation, unlike the possession of a firearm in a school zone, involves an economic activity.

Because the GFSZA's noncommercial nature precipitated its downfall, the economic aspect of child support may be the decisive factor in evaluating the validity of the CSRA. The Court in *Lopez* did not eradicate sixty years of Commerce Clause jurisprudence, but merely concluded that the expansive interpretation of the Commerce Clause that the Court had developed since the New Deal did not permit upholding the GFSZA:

> Even *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not. . . .
>
> [The GFSZA] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. [The GFSZA] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[239]

Thus, the Court did not reject the "substantial effects" test. Rather the Court supplemented the test with a requirement that the regulated activity have a commercial or economic nature. With regard to this commercial/noncommercial distinction, *Lopez* may signal a change in Commerce Clause jurisprudence. Pre-*Lopez* decisions focused not upon the commercial nature of the regulated activity, but upon whether that activity substantially affected interstate commerce.[240]

---

238. *See infra* notes 273-80 and accompanying text.

239. United States v. Lopez, 115 S. Ct. 1624, 1630-31 (1995) (citations omitted).

240. *Id.* at 1663 (Breyer, J., dissenting). In his dissent, Justice Breyer indicated that Katzenbach v. McClung, 379 U.S. 294 (1964), and Perez v. United States, 402 U.S. 146 (1971), focused on the effects of the regulated activity on interstate commerce rather than on the economic/noneconomic nature of that activity:

> [I]f a distinction between commercial and noncommercial activities is to be made, [*Lopez*] is not the case in which to make it. The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases . . . or *Perez*—in each of those cases the specific transaction . . . was not itself "commercial."

Id. at 1664 (Breyer, J., dissenting); *see supra* notes 138-48 and accompanying text. Moreover, Justice Breyer emphasized that the Court in *Wickard* expressly held that

Despite the "commercial" requirement under *Lopez*, the CSRA is constitutional. The CSRA may be distinguished from the GFSZA because the child support transaction involves money changing hands, a traditional economic activity, whereas the possession of a gun in a school zone does not.[241] Indeed, the basic function of child support is an economic one—to provide money to the custodial parent on behalf of the child. Each support order involves a transaction—an immediate obligation to pay a sum of money to another party. Once payment is made, dollars are exchanged across state lines in satisfaction of the obligation. Moreover, as suggested in *Hopper*, even should the order remain unpaid, an economic obligation nonetheless exists.[242]

Accordingly, the child support payment obligation more closely approximates the economic activities regulated and upheld in *Wickard*[243] (producing and consuming wheat), *Heart of Atlanta Motel*[244] (operating a motel), *Katzenbach*[245] (operating a restaurant), and *Perez*[246] (engaging in extortionate credit transactions) than the conduct at issue in *Lopez*[247] (possessing a firearm). Consequently, pre-*Lopez* jurisprudence is more applicable to an assessment of the constitutionality of the CSRA than is *Lopez*, and the CSRA should be upheld pursuant to the Court's expansive Commerce Clause holdings prior to *Lopez*. If one farmer's primarily intrastate activity in *Wickard* can be deemed to affect interstate commerce substantially, so must the forlorn obligation of a deadbeat parent which, in the aggregate, accounts for more than $5 billion in unpaid child support.[248]

Thus, the child support payment obligation itself, as an economic activity, has a substantial relation to interstate commerce. Yet, even in an ancillary fashion, nonsupport in many ways relates to and influences commerce—it results in increases in federal, state, and local expenditures, leads to a greater incidence of poverty, and alters the flow of money in interstate commerce.

First, the nonpayment of child support leads to increases in expenditures for public assistance programs, thus affecting government fiscal policy and adversely influencing the ability of the federal government, states, and localities to manage their limited resources. Almost one-half of the families headed by single mothers receive welfare, and

---

an activity may be regulated, " '*though it may not be regarded as commerce*,' . . . so long as 'it exerts a substantial economic effect on interstate commerce.' " *Id.* at 1663-64 (Breyer, J., dissenting) (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942) (emphasis added)); *see supra* text accompanying notes 125-29.

241. United States v. Sage, No. 3:95CR108 (DJS), 1995 WL 627950, at *3 (D. Conn. Oct. 3, 1995).

242. *See* United States v. Hopper, 899 F. Supp. 389, 392.

243. *See supra* text accompanying notes 125-29.

244. *See supra* text accompanying notes 130-37.

245. *See supra* text accompanying notes 138-43.

246. *See supra* notes 144-48 and accompanying text.

247. *See supra* part III.B.

248. *See supra* notes 24, 125-29 and accompanying text.

"there is little doubt that the proportion needing welfare at any time would increase quite dramatically in the absence of any public enforcement of private child support."[249] Both the federal government and the states share these additional costs. The federal government, for example, contributed $13 billion (fifty-seven percent) of the money spent on AFDC in 1995.[250]

Second, single parents who do not receive support are more likely to live below the poverty line and, in turn, have less money to pour into the economy by means of expenditures for goods and services.[251] According to Census figures, single mothers had a poverty rate of thirty-five percent and single fathers had a poverty rate of thirteen percent—both well above the eight percent rate for married couples with children.[252] In 1991, custodial parents who actually collected child support had an average total income twenty-one percent higher than custodial parents who were awarded child support but did not receive payment.[253] A 1992 study based on interviews with low and moderate-income women found that within the first year after the father leaves, thirty-two percent of children go without food, fifty-five percent without medical care, and thirty-seven percent without appropriate clothing.[254]

Research also has shown that a decline in income for a single-parent family can have serious long-term effects. According to one study, differences in income between single-parent families and two-parent families account for a substantial portion of a child's risk of dropping out of high school or becoming a teen mother.[255] Thus, the failure to

249. Irwin Garfinkel, Assuring Child Support: An Extension of Social Security 9 (1992) (citation omitted); *see supra* note 66 and accompanying text. Moreover, "[w]hen child support payments rise and AFDC participation rates fall, government expenditures on AFDC are likely to decline. Expenditures decline both because the number of AFDC recipients falls and because average benefits paid to those who remain on AFDC are reduced." Beller & Graham, *supra* note 66, at 233.

250. *See* Robert Pear, *Senate Committee Approves A Vast Overhaul of Welfare*, N.Y. Times, May 27, 1995, at 1, 8.

251. *See* Beller & Graham, *supra* note 66, at 245. Single mothers who receive child support have higher incomes and are less likely to live in poverty than mothers who do not receive their support awards. *Id.* at 245. Moreover, if average child support payments were increased, single mothers' current income and short-term economic well-being would improve. *Id.* at 225; *see* Roberts, *supra* note 17, at 2 ("With an average child support payment of $3,000 per year, a mother of two, working full time at a low-wage job would still be able to get her family out of poverty *if* she could obtain such a payment. Securing regular, reliable child support is thus an integral part of an anti-poverty strategy.").

252. Child Support 1991, *supra* note 19, at 1.

253. *Id.* at 9. The average child support amount received by custodial mothers receiving all or some payment was $3011; for fathers the amount was $2292. *Id.* at 2.

254. *See supra* note 65 and accompanying text.

255. McLanahan & Sandefur, *supra* note 18, at 89-90. Before adjusting for income, the difference in graduation rates between children in single-parent families and children in two-parent families was 6%; after adjusting for income, the difference was 3%. *Id.* Similarly, about 40% of the difference in grade-point average and school

pay child support affects the custodial parent and child, and can have profound social and economic implications for future generations.

Third, as *Sage* demonstrated, even should increases in expenditures by the noncustodial parent compensate for decreases by the custodial parent, the flow of money in interstate commerce nonetheless would be altered.[256] Expenditures that would have been made by the custodial parent likely will be made by the noncustodial parent in the state where he resides, which, necessarily, will differ from the child's home state.

The argument that these ancillary effects of nonsupport—an increase in public expenditures, a rise in poverty, and a change in the money flow—substantially affect interstate commerce admittedly may be difficult to reconcile with *Lopez*. Indeed, in *Lopez* the government unsuccessfully asserted that the possession of guns in a school zone would increase violent crime, which in turn would decrease travel to unsafe areas and increase societal costs through increased insurance rates.[257] Furthermore, the Court was unwilling to accept the argument that the presence of guns in schools would threaten the learning environment, which in turn would create a less productive citizenry and adversely affect the nation's economic well-being.[258]

The nexus between the activity being regulated and interstate commerce, however, is more ambiguous with regard to the GFSZA than to the CSRA. The effects and economic implications of unpaid child support are more obvious than are the "costs of crime," and do not require the sweeping inferences that would be needed to uphold the GFSZA. When custodial parents who do not receive support require public assistance to recapture some of their lost income, the federal government, the states, and the taxpayers bear the brunt of these additional costs. When public benefits do not fully substitute for the loss of support payments, the custodial parent has less money to spend on goods and services for her child. Even when the amount of money moving in commerce does not change, the flow of money in interstate commerce is affected.

Thus, the child support payment obligation itself is an economic activity which substantially influences interstate commerce. With more than 2.5 million parents who do not receive their full support payments,[259] the increases in expenditures and poverty and the resulting changes in the interstate flow of money provide bases for upholding the Act.

---

performance can be attributed to single parents' lower incomes. *Id.* at 91. Lower income is also a substantial cause of higher teen birth rates among children of single parents. The difference in the risks of teen births is 9% before adjusting for income and 4% after adjusting for income. *Id.* at 90.

256. *See supra* text accompanying notes 234-35.

257. *See supra* notes 155, 165 and accompanying text.

258. *See supra* notes 156, 166 and accompanying text.

259. *See supra* note 23.

B. *Congressional Findings*

Justice Breyer, dissenting in *Lopez*, stated that the test for upholding the GFSZA should have been "whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce."[260] Justice Breyer found such a rational basis, despite the lack of express legislative findings of an interstate commerce nexus.

The Court's decision, however, was somewhat driven by the dearth of findings. The majority held that while "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," such findings would have been helpful in considering Congress's judgment that the activity in question substantially affected interstate commerce.[261]

Unlike the GFSZA, the legislative history of the CSRA provides evidence that Congress considered, in particular, the interstate aspect of the problem the statute was seeking to remedy. The findings clearly indicate that Congress aimed to ensure that only interstate cases would come within the province of the CSRA:

> [The CSRA] addresses the problem of interstate enforcement of child support by taking the incentive out of moving interstate to avoid payment. The bill is designed to target interstate cases only. These are the cases which state officials report to be clearly the most difficult to enforce, especially the "hard core" group of parents who flagrantly refuse to pay and whom traditional extradition procedures have utterly failed to bring to justice.[262]

This statement seems a clear indication of Congress's intent to specially target cases with a substantial interstate nexus.

Furthermore, the legislative history contains findings concerning the interstate aspect of the CSRA and the effect of child support on federal expenditures and family economics. Congress examined the annual $5 billion discrepancy between the amount of child support awarded and the amount collected, and noted that this deficit "greatly increases the cost to the States and the Federal government in helping [ ] families 'make ends meet,' "[263] particularly through increased enrollment in the AFDC program.[264] A thirty-nine percent increase in the number of single-mother households over the past decade, and the resultant increase in the number of these families living below the poverty level, provided additional impetus for the passage of the

260. United States v. Lopez, 115 S. Ct. 1624, 1659 (1995) (Breyer, J., dissenting).

261. *Id.* at 1631-32.

262. Legislative History, *supra* note 5, at 6.

263. *Id.* at 5.

264. *Id.* at 5 (stating that in 1988, 6.4 million children from homes in which the father was absent were enrolled in the AFDC program, and that this number has since increased); *see supra* notes 66, 249-50 and accompanying text.

Act.[265] Congress reasoned that these figures "make clear that financial support from non-custodial parents is essential in helping children and their caretaker remain or become self-sufficient."[266]

Moreover, the Court has upheld a federal criminal statute after deferring to congressional findings regarding an activity's effect upon interstate commerce. In *Perez*, the Court upheld Title II of the Consumer Credit Protection Act, which criminally sanctioned loan sharking.[267] The Court deferred to congressional findings which concluded that loan sharking, although purely intrastate in nature, nevertheless directly affected interstate commerce.[268] Analogously, the legislative history accompanying the CSRA lends support to the conclusion that child support substantially affects interstate commerce.[269]

Finally, while the courts that overturned the CSRA did so for fear that the Act permitted Congress to usurp the traditional rights of the states to define and enforce criminal law, the legislative history of the CSRA does not evidence an intent on the part of Congress to preempt state law. Congress considered the successes of the Child Support Enforcement Amendments of 1984 and the Family Support Act of 1988, but recognized that in interstate cases "the annual deficit in child support payments remains unacceptably high."[270] Congress also noted that many states have statutes making the willful failure to pay child support a crime.[271] Congress realized, however, that "the ability of [these] states to enforce such laws outside their own boundaries is severely limited."[272]

Thus, the CSRA was a rational response by Congress to account for difficulties specific to interstate child support enforcement. At best, existing state and federal laws provided an unwieldy approach to the enforcement problem. Congress did not intend for the CSRA to substitute for existing statutes and programs, but rather hoped that the Act would complement state and federal legislation only where most needed—in interstate cases.

C. *The Jurisdictional Element*

The CSRA clearly identifies an interstate nexus by providing that "[w]hoever willfully fails to pay a past due support obligation *with*

265. Legislative History, *supra* note 5, at 4-5.
266. *Id.* at 5.
267. *See supra* text accompanying notes 145-46.
268. *See supra* notes 147-48 and accompanying text.
269. Furthermore, the activities being regulated by the CSRA and the Consumer Credit Protection Act are similarly commercial. *See supra* part V.A.
270. Legislative History, *supra* note 5, at 5 (referring to the General Accounting Office study reporting that more than half of custodial parents in interstate cases did not receive full support payments); *see supra* notes 60-63 and accompanying text.
271. Legislative History, *supra* note 5, at 5; *see supra* note 74 and accompanying text.
272. Legislative History, *supra* note 5, at 6.

respect to a child who resides in another State" shall be subject to prosecution.[273] The requirement of diversity between noncustodial parent and child provides a jurisdictional element which ensures that the Act will be invoked only in interstate cases.[274] As noted in *Murphy*, CSRA prosecutions always involve financial transactions or obligations to individuals in two states.[275] Thus, built into the statute is an implicit prerequisite that a monetary obligation occur across state lines.[276]

The Court in *Lopez* held that the GFSZA lacked an "express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."[277] The jurisdictional element of the CSRA, therefore, distinguishes it from the statute struck down in *Lopez*.

This jurisdictional element, however, is problematic in some respects. The court in *Schroeder* discounted the jurisdictional element of the CSRA, holding that the requirement that the delinquent parent and the child live in different states is not sufficient to establish a substantial relation to interstate commerce.[278] The court held that because the government did not have to prove intent to flee as an element of the crime, CSRA prosecution would be possible when the custodial parent, rather than the delinquent parent, changed states.[279] Thus, the court found that "[t]he nexus of requiring the non-paying parent and the child to live in different states goes beyond those cases the CSRA was aimed to address, namely parents who flee a state in an attempt to avoid child support payment."[280]

The bedrock purpose of the CSRA, however, is to deter the nonpayment of support. From a public policy perspective, criminal penalties against a deadbeat parent often are justified in situations where the deadbeat parent does not flee to another state. The custodial parent who moves from one state to another for fear that either she or her children will be harmed by the noncustodial parent, for example, should not be precluded from utilizing the CSRA. Moreover, even if more individuals fall within the purview of the CSRA than would be necessary for the legislation to serve the more limited goal of prose-

273. 18 U.S.C § 228(a) (1994) (emphasis added).

274. *See* United States v. Sage, No. 3:95CR108 (DJS), 1995 WL 627950, at *5 (D. Conn. Oct. 3, 1995); United States v. Hopper, 899 F. Supp. 389, 392 (S.D. Ind. 1995); United States v. Murphy, 893 F. Supp. 614, 616 (W.D. Va. 1995); United States v. Hampshire, 892 F. Supp. 1327, 1329 (D. Kan. 1995).

275. *See supra* text accompanying notes 215-16.

276. *Murphy*, 893 F. Supp. at 616.

277. United States v. Lopez, 115 S. Ct. 1624, 1631 (1995).

278. *See supra* text accompanying notes 188-91.

279. *See supra* text accompanying note 190.

280. United States v. Schroeder, 894 F. Supp 360, 365 (D. Ariz. 1995).

cuting fleeing parents, each application of the Act nonetheless would involve a monetary transaction or obligation across state lines.

CONCLUSION

Congress enacted the CSRA to alleviate some of the enormous obstacles to collecting an interstate child support award. Although the constitutionality of the Act has been challenged since the Supreme Court decided *United States v. Lopez*, three elements of child support collection and the CSRA distinguish it from gun possession and the GFSZA: (1) the payment of child support is more of a "commercial" activity than is the possession of a gun; (2) congressional reports are replete with references concerning the obstacles faced in the enforcement of an interstate child support award, whereas legislative findings did not accompany the GFSZA; and (3) the CSRA has a jurisdictional element which necessitates an interstate transaction, whereas gun possession may be wholly intrastate.

The very lack of these three elements—*no* "commercial" activity, *no* congressional findings, and *no* jurisdictional element—seemed to drive the *Lopez* decision. Inasmuch as the CSRA may be distinguished in each of these three areas from the GFSZA, the CSRA is a valid exercise of Congress's commerce power.